Cracks in the Wall: The Persistent Influence of Ideology in Establishment Clause Decisions

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ABSTRACT

In our ongoing empirical examination of religious liberty decisions in the federal courts, extended now into a third decade, we find the persistence of ideological influence in Establishment Clause decisions for the period of 2006–2015. Because a non-partisan judiciary is essential to preserve the rule of law, we should sound the alarm when partisan influences appear to be weighting the outcome.

At the same time, one might take comfort in a systematic narrowing of the partisan gap in this most recent ten-year period for our study. For 1996–2005, we had found an Establishment Clause claimant's chances for success were approximately 2.25 times higher before a judge appointed by a Democratic President than one appointed by a Republican President. By this 2006–2015 period, the Establishment Clause claimant advantage before a Democratic-appointed judge had fallen to about one-third higher than before a Republican-appointed judge.

Moreover, a Supreme Court precedent variable was the single most significant, robust, and powerful influence on the outcome. Thus, our findings suggest that legal controls may meaningfully confine subjective discretion and reduce the influence of extra-legal factors in federal court decision-making.

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INTRODUCTION

The "last wall" of our democratic republic—an independent and impartial judiciary—would not be breached.[1]

Having been defeated for re-election in 2020 by a substantial margin in both the electoral college and the popular vote, President Donald Trump was leaving no stone unturned in his increasingly desperate attempts to overturn a democratic election. He sought to conscript the Department of Justice to his false campaign alleging rampant fraud by conspiring to remove the acting Attorney General and install a loyalist who would publicly announce investigations and obstruct election result verifications.[2] He leveraged his high office through phone calls from and meetings at the White House to pressure Republican state election officials and state legislators to void the election results in particular states, pleading for their help and berating them for any resistance.[3] He held a meeting in the Oval Office where enablers encouraged him to appoint a special counsel and to declare martial law to have the military intervene to conduct a new election.[4] He succeeded in

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1. Rosalind S. Helderman & Elise Viebeck, *'The Last Wall': How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts To Overturn the Election*, WASH. POST (Dec. 12, 2020), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html [https://perma.cc/KM88-3EMP] (quoting Professor Charles Geyh in referring to federal judges as "the last wall").

2. Matt Zapotosky & Robert Barnes, *Inspector General Will Investigate Whether Any Justice Dept. Officials Improperly Sought To Help Trump Overturn the Election*, WASH. POST., (Jan. 25, 2021), https://www.washingtonpost.com/national-security/justice-department-inspector-general-trump-election/2021/01/25/6cfcfb24-5f2f-11eb-afbe-9a11a127d146_story.html [https://perma.cc/7R6M-RBGP]; Matt Zapotosky, Devlin Barrett, & Carol D. Leonnig, *Trump Entertained Plan To Install an Attorney General Who Would Help Him Pursue Baseless Election Fraud Claims*, WASH. POST. (Jan. 22, 2021), https://www.washingtonpost.com/national-security/trump-justice-department-overturn-election/2021/01/22/b7f0b9fa-5d1c-11eb-a976-bad6431e03e2_story.html?utm_campaign=wp_main&utm_medium=social&utm_source=twitter [https://perma.cc/KF54-QLJP].

3. Philip Bump, *What We Know About Trump's Efforts To Subvert the 2020 Election*, WASH. POST. (Jan. 25, 2021), https://www.washingtonpost.com/politics/2021/01/25/what-we-know-about-trumps-efforts-subvert-2020-election/ [https://perma.cc/4B9L-YDRP]; Amy Gardner & Paulina Firozi, *Here's the Full Transcript and Audio of the Call Between Trump and Raffensperger*, WASH. POST. (Jan. 5, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html [https://perma.cc/2MLB-Y7NZ].

4. Maggie Haberman & Zolan Kanno-Youngs, *Trump Weighed Naming Election Conspiracy Theorist as Special Counsel*, N.Y. TIMES (Jan. 18, 2021), https://www.nytimes.com/2020/12/19/us/politics/trump-sidney-powell-voter-fraud.html [https://perma.cc/D83P-257A]; Jonathan Swan & Zachary Basu, *Bonus Episode: Inside the*

enlisting hundreds of Republican members of Congress in an unprecedented and unconstitutional effort to block certification of the electoral college results.[5] He inspired thousands of his most zealous followers to storm the Capitol Building in a violent insurrection to obstruct congressional certification of the electoral college results confirming that Joe Biden had been elected president.[6]

But throughout the partisan political storm, the last wall of the judiciary held. In the federal courts, Donald Trump faced defeat after defeat, dozens of times.[7] An impartial and non-partisan federal judiciary was having none of his unsupported claims of election fraud or his extreme requests to disenfranchise millions of voters. Judges appointed by the presidents of his own party, including judges appointed by President Trump himself, rejected in scathing terms the claims that he and his supporters raised.

Judge Stephen Bibas of the United States Court of Appeals for the Third Circuit, appointed by President Trump, wrote for a unanimous panel that "calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here."[8]

Judge Steven Grimberg of the Northern District of Georgia, also appointed by Trump, found "no basis in fact or in law" to justify the "unprecedented" harm to the public that would follow by granting injunctive relief to prevent certification of the election.[9]

Judge Brett Ludwig of the Eastern District of Wisconsin, appointed by Trump, described the matter before him as an "*extraordinary* case," in which

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Craziest Meeting of the Trump Presidency, AXIOS (Feb. 2, 2021), https://www.axios.com/trump-oval-office-meeting-sidney-powell-a8e1e466-2e42-42d0-9cf1-26eb267f8723.html [https://perma.cc/SG8B-XUU9].

5. Rosalind S. Helderman, Karoun Demirjian, Seung Min Kim & Mike DeBonis, *Congress Affirms Biden's Presidential Win Following Riot at U.S. Capitol*, WASH. POST. (Jan. 7, 2021), https://www.washingtonpost.com/politics/congress-resumes-work-to-confirm-biden-win-on-historic-day-marred-by-riot/2021/01/06/4c3729dc-5039-11eb-b96e-0e54447b23a1_story.html [https://perma.cc/3D5N-N49J]; Harry Stevens, Daniela Santamariña, Kate Rabinowitz, Kevin Uhrmacher & John Muyskens, *How Members of Congress Voted on Counting the Electoral College Vote*, WASH. POST. (Jan. 7, 2021, 12:48 PM), https://www.washingtonpost.com/graphics/2021/politics/congress-electoral-college-count-tracker/ [https://perma.cc/2CAN-YJP7].

6. Aaron Blake, *'Let's Have Trial by Combat': How Trump and Allies Egged On the Violent Scenes Wednesday*, WASH. POST (Jan. 6, 2021), https://www.washingtonpost.com/politics/2021/01/06/lets-have-trial-by-combat-how-trump-allies-egged-violent-scenes-wednesday/?utm_source=twitter&utm_medium=social&utm_campaign=wp_main [https://perma.cc/W93Z-K4U6].

7. *See* Helderman & Viebeck, *supra* note 1.

8. Donald J. Trump for President, Inc. v. Secretary of Pennsylvania, 830 F. App'x 377, 381 (3d Cir. 2020).

9. Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1331 (N.D. Ga. 2020).

a "sitting president who did not prevail in his bid for reelection has asked for federal court help in setting aside the popular vote based on disputed issues of election administration."[10] Ludwig declared that the court had "allowed the plaintiff to make his case and he has lost on the merits," observed that Trump had asked that the rule of law be followed, and concluded that "[i]t has been."[11]

Judge Matthew Brann of the Middle District of Pennsylvania, appointed by President Obama but formerly a Republican Party county chair, described the Trump campaign's request to "discard millions of votes" as "such a startling outcome" that one would expect the plaintiff to "come formidably armed with compelling legal arguments and factual proof of rampant corruption."[12] Instead, he reported, the court "has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence."[13]

An impartial non-partisan judiciary could not be swayed by the raw political agenda and false public accusations of a sitting President who happened to have appointed many of those judges to their lifetime tenure. As said by another district judge, when dismissing attempts to set aside the presidential election result in Arizona, "[a]llegations that find favor in the public sphere of gossip and innuendo cannot be a substitute for earnest pleadings and procedure in federal court."[14] On these points, the judges were in bipartisan agreement—or, more accurately, *non*-partisan accord. An analysis in the *Washington Post* happily reported that "the dozens of opinions serve as a resounding reaffirmation of the judiciary's nonpartisan commitment to basic principles of reason, fact and law."[15]

As members of the legal profession, we are justifiably proud (and relieved) that the federal courts held the line against frivolous legal arguments and unsupported factual assertions engineered by Trump and his political allies to reverse the presidential election. At the same time, we should in all fairness acknowledge that the court wall does not always stand unbroken. Having been reminded that a non-partisan judiciary is essential to preserve the rule of law, we should be all the more distressed when we observe federal judges returning to partisan corners on another matter.

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10. Trump v. Wisconsin Elections Comm'n, 506 F. Supp. 3d 620, 639 (E.D. Wis. 2020) (emphasis in original).

11. *Id.*

12. Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 906 (M.D. Pa. 2020).

13. *Id.*

14. Bowyer v. Ducey, 506 F. Supp. 3d 699, 724 (D. Ariz. 2020).

15. Helderman & Viebec, *supra* note 1.

Alas, decisions in the federal courts on challenges to government action under the Establishment Clause of the First Amendment illustrate the persistence of ideological influence, one that we have documented previously. In this third iteration of our empirical examination of religious liberty decisions in the lower federal courts,[16] we studied all digested Establishment Clause decisions by federal circuit and district court judges from 2006 through 2015.[17] Holding all other variables constant, Democratic-appointed judges were predicted to uphold claims challenging government conduct on Establishment Clause grounds at a 45% rate, while the predicted probability of success fell to 33% before Republican-appointed judges.[18]

We might take comfort in a narrowing of the partisan gap in this most recent ten-year period for our study.[19] For the earlier 1996–2005 period of study, we had found an Establishment Clause claimant's chances for success were approximately 2.25 times higher before a judge appointed by a Democratic President than one appointed by a Republican President.[20] By the 2006–2015 period, the Establishment Clause claimant advantage before a Democratic-appointed judge had fallen to about one-third higher than before a Republican-appointed judge.[21] Moreover, one of our Supreme Court precedential variables was the single most significant, robust, and powerful influence on the outcome.[22] Thus, our findings suggest that legal controls may meaningfully confine subjective discretion and reduce the influence of extra-legal factors in federal court decision-making.[23]

Nonetheless, the "jurisprudential schizophrenia"[24] that has so long characterized Establishment Clause doctrine continued to leave at least some room for a troubling, even if waning, emergence of ideological differences

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16. Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201 (2012) [hereinafter *Ideology All the Way Down*]; Michael Heise & Gregory C. Sisk, *Religion, Schools, and Judicial Decision Making: An Empirical Perspective*, 79 U. CHI. L. REV. 185 (2012) [hereinafter *Religion, Schools, and Judicial Decision Making*]; Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005) [hereinafter *Judges and Ideology*]; Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004) [hereinafter *Searching for the Soul of Judicial Decisionmaking*].

17. *See infra* Part I.

18. *See infra* Sections II.A, II.C.

19. *See infra* Section I.I.C.

20. *Ideology All the Way Down*, *supra* note 16, at 1216.

21. *See infra* Section II.Caa.1.

22. *See infra* Section II.Caa.2.

23. *See infra* Section II.Caa.1.

24. Thomas v. Anchorage Equal Rts. Comm'n, 165 F.3d 692, 717 (9th Cir. 1999).

among federal judges.[25] Noah Feldman declared that "we are, increasingly, a nation divided by God," because, as a polity, we "cannot agree on what the relation between religion and government should be."[26] The "devotional divide"[27] between an increasingly secular Democratic Party and a Republican Party dominated by a religiously devout evangelical base appears to intrude into judicial deliberations as well.

If the Establishment Clause doctrine established by Supreme Court decisions is sufficiently malleable and characterized by ill-defined standards, then a judge may find no alternative than consulting his or her own views on the proper role of religion or religious values in public life.[28] Having previously described the Supreme Court's Establishment Clause jurisprudence as "a case of judicial malpractice"[29] our question remains whether the legal physician's healing powers are beginning to defeat the political disease. The systematic reduction in the margin of the partisan judicial divide on Establishment Clause outcomes may be a sign of a healthy non-partisan recovery.[30]

I. A SUMMARY DESCRIPTION OF DATA AND FINDINGS IN STUDYING ESTABLISHMENT CLAUSE DECISIONS IN THE FEDERAL COURTS, 2006–2015

For the ten-year period of 2006–2015, we examined decisions made by judges of both the federal courts of appeals and district courts involving challenges to governmental conduct as violating the Establishment Clause.[31] The first clause of the First Amendment to the United States Constitution directs that "Congress shall make no law respecting an establishment of religion[.]"[32] That provision has generated decades of controversy regarding the appropriate role of religion in public life.

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25. *See infra* Section II.B.

26. NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 235 (1st ed. 2005).

27. David E. Campbell, *A House Divided? What Social Science Has To Say About the Culture War*, 15 WM. & MARY BILL RTS. J. 59, 64 (2006).

28. *See infra* Section II.B.

29. *Ideology All the Way Down*, *supra* note 16, at 1261.

30. *See infra* Section II.C.

31. We also conducted a parallel empirical study for the same period of Free Exercise decisions in the lower federal courts which will be reported in a separate article. Michael Heise & Gregory C. Sisk, *Approaching Equilibrium in Free Exercise of Religion Cases? Empirical Evidence from the Federal Courts*, 64 ARIZ. L. REV. (forthcoming).

32. U.S. CONST. amend. I.

A. Data

For the 2006–2015 period, we created a dataset[33] of the universe of digested decisions by the federal district courts and courts of appeals on Westlaw on Establishment Clause claims,[34] which were coded by the direction of each judge's ruling, the general factual category of the case, the religious affiliation of the judge, the religious demographics of the judge's community, the judge's ideology, the judge's race and gender, and various background and employment variables for the judge.[35]

As in the prior two stages of our longitudinal study, our point of analysis was each individual judge's ruling in an individual case as a "judicial participation."[36] The primary focus of our study was the judge rather than the court as an institution or a collective appellate panel,[37] that is, we measured the individual response of each district or circuit judge to each Establishment Clause claim.

For the district judges in our study, we acknowledge that most district court decisions are not reduced to writing, much less published or digested.[38] A recent empirical study by Christina Boyd, Pauline Kim, and Margo Schlanger of district court dockets found that commercial law databases of written decisions identify only about 10% of cases (and fall to 2% for

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33. Greg Sisk & Michael Heise, *Empirical Study of Religious Liberty Decisions (2006-2015)*, ARDA (July 25, 2022), https://www.thearda.com/data-archive?fid=SISK2015 [https://perma.cc/JFR3-MNML].

34. With the addition that we included unpublished digested decisions, our Westlaw search terms and our method for identifying religious liberty decisions is described in *Searching for the Soul of Judicial Decisionmaking*, *supra* note 16, at 534–44.

35. Every decision was independently coded by both a trained law student and one of the authors. For more detailed information about our coding, see the description published as part of our prior study of religious liberty decisions. *See Searching for the Soul of Judicial Decisionmaking*, *supra* note 16, at 530–54, 571–612. The few changes in the definition of variables and coding from the prior study may be found by reviewing our coding and code books. *See* Heise & Sisk, *supra* note 31, at 17–21, 54–56.

36. For a further discussion of judicial participations as the data point, see *Searching for the Soul of Judicial Decisionmaking*, *supra* note 16, at 539–41.

37. We did, however, control for the Party-of-Appointing-President of the other judges on three-judge appellate panels in alternative regression runs, thus conducting a limited exploration of panel effects. *See infra* Section I.A.

38. *See* David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007) (3% with written decisions); Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782, 789–90 (1992) (5% with reported decisions); Margo Schlanger & Denise Lieberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 UMKC L. REV. 153, 163 (2006) (8.7% with written decisions and 2.3% with reported decisions).

published decisions).[39] Although they rightly worry that limiting studies to written decisions "will often lead to skewed empirical results"[40] we have reason to believe the disparity is less pronounced in this particular context. In the last stage of our study, we found evidence that the high visibility area of Establishment Clause challenges to government interaction with religion produced a higher rate of written dispositions by district judges.[41] In a spot-check of 100 Establishment Clause complaints identified in a search of the Westlaw Pleadings database, we found that nearly three-quarters did lead to written decisions, most of which were also published.[42]

Our confidence is even greater that we captured the lion's share of the Establishment Clause decisions in the federal courts of appeals, given that all completed appeals result in written dispositions. Researchers have suggested that conclusions drawn from only published appellate decisions may not reflect what would be learned by studying the broader universe of appellate decisions.[43] So beyond published decisions, our expanded dataset includes all digested unpublished decisions in the federal circuits. We recognize that even this is imperfect, as recent examination indicates that perhaps as much as a quarter of federal appellate terminations on the merits are not included among the unpublished decisions collected in commercial databases.[44] Here too, however, there is no reason to believe that the peculiarly controversial questions of Church and State are resolved in a way that drops off the map. Unpublished decisions at the court of appeals level account for only 14% of our appellate observations (expanding our appellate court dataset from 316 to 357), suggesting that the issues raised were especially likely to draw not only a written but a published decision.

In coding decisions on the merits, a ruling by a district judge must have accepted or rejected a particular claim in a manner that engaged the merits of

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39. Christina L. Boyd, Pauline T. Kim & Margo Schlanger, *Mapping the Iceberg: The Impact of Data Sources on the Study of District Courts*, 17 J. EMPIRICAL LEGAL STUD. 466, 475 (2020).

40. *Id.* at 469.

41. *Ideology All the Way Down*, *supra* note 16, at 1210.

42. *Id.*

43. Keith Carlson, Michael A. Livermore & Daniel N. Rockmore, *The Problem of Data Bias in the Pool of Published U.S. Appellate Court Opinions*, 17 J. EMPIRICAL LEGAL STUD. 224, 225 (2020).

44. Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1105–07 (2021); *see also* Jason Rantanen, *Missing Decisions and the United States Court of Appeals for the Federal Circuit*, U. PENN. L. REV. ONLINE (forthcoming) (manuscript at 3–4) (on file with the University of Pennsylvania Law Review) (observing that the disparity between appeals reported terminated by the federal judiciary and decisions in the commercial databases may actually be somewhat lower because decisions on the commercial databases sometimes decide multiple appeals and the judiciary's report counts some appeals twice if they were reinstated after an initial dismissal).

the claim, even if the ruling was not a final judgment, while non-merits procedural rulings were excluded.[45] In a refinement of our prior approach, following the lead of Sepehr Shahshahani and Lawrence Liu, we did code rulings between 2006 and 2015 that raised questions of justiciable standing in Establishment Clause cases as effectively being on the merits.[46] In the particular context of Establishment Clause claims, the question of what counts as a legally cognizable harm links the question of standing to bring suit with the question on the merits.[47] In addition, again as suggested by Shahshahani and Liu,[48] we did not omit any Establishment Clause decision that also happened to be coded in our Free Exercise dataset.[49]

For court of appeals decisions, a ruling was coded on the merits if it affirmed or reversed a final judgment by a district court on an Establishment Clause claim or remanded the case after an evaluation of a significant element of the merits of the claim. If a three-judge appellate panel issued a decision that later was reheard en banc (or was the subject of a dissent from the denial of rehearing en banc), each judge was recorded as having cast only one judicial vote, even if the judge participated on both the three-judge panel and the en banc panel (or the dissent from the denial of rehearing). Table 1 presents a descriptive summary of our data set.

Table 1: Summary Descriptive Statistics[50]

	Mean	Std. Dev.
Dependent Variable:		
Judge vote (1=religious claimant prevailed on an issue)	0.38	0.48
Case Type:		
Priv. Educ.	0.02	0.14
Pub. Educ. (Elementary)	0.17	0.38
Pub. Educ. (Secondary)	0.07	0.26
Pub. Educ. (Higher)	0.03	0.17
Religious Meetings	0.15	0.36

45. *See also* Adam M. Samaha & Roy Germano, *Are Commercial Speech Cases Ideological? An Empirical Inquiry*, 25 WM. & MARY BILL RTS. J. 827, 847 (2017) (similarly excluding "anterior" procedural decisions from rulings on the merits).

46. *See* Sepehr Shahshahani & Lawrence J. Liu, *Religion and Judging on the Federal Courts of Appeals*, 14 J. EMPIRICAL LEGAL STUD. 716, 723 (2017).

47. *See* Michael W. McConnell, *No More (Old) Symbol Cases*, 2018-2019 CATO SUP. CT. REV. 91, 116–18 (2019). On standing in Establishment Clause cases, see *infra* notes 177–191 and accompanying text.

48. Shahshahani & Liu, *supra* note 46, at 722.

49. On our Free Exercise dataset, see *supra* note 31.

50. N=498.

Religious Symbols	0.17	0.37
Judge Religion:		
Catholic	0.26	0.44
Baptist	0.03	0.17
Other Christian	0.12	0.33
Jewish	0.14	0.35
Latter-Day Saints	0.04	0.19
Other	0.01	0.11
No Religious Affiliation	0.11	0.32
Judge Sex and Race:		
Sex (Female=1)	0.25	0.44
African American	0.11	0.31
Asian-Latino	0.08	0.27
Judge Ideology or Attitude:		
Party of Appoint. POTUS (1=Rep.)	0.56	0.50
Common Space Score	0.09	0.40
ABA Rating-Above Qualified	0.67	0.47
ABA Rating- Below Qualified	0.09	0.29
Seniority on Fed. Bench (mos.)	211.14	122.57
Elite Law School	0.37	0.48
Judge Emp. Background:		
Military	0.27	0.44
Government	0.62	0.48
State or Local Judge	0.31	0.46
Law Professor	0.11	0.31
Community Demographics:		
Catholic %	21.70	7.72
Jewish %	2.19	1.84
Non-Religious %	23.68	4.65
Precedent Variables:		
After-*Winn*	0.37	0.48
After-*Greece*	0.12	0.33

B. Empirical Strategy

Because the dependent variable is dichotomous and given the hierarchical structure of our data, we estimate mixed-effects models of our dichotomous outcome variable.[51] Our two primary models (using different proxies for ideology) generated substantially similar results. Table 2 presents results from our two models.

51. Specifically, our core results emerge from estimations using the "meqrlogit" command in Stata (v.16.1).

Our Establishment Clause data set consisted of 498 judicial participations, in which the claim was favorably received by the ruling judge 37.6% of the time (or 187 observations). In our prior two time-period studies, Establishment Clause claimants succeeded at a similar rate of 39.8% for 1996–2005 and 42.3% for 1986–1995.[52]

Table 2: Mixed-Effects Logistic Regression Models of Establishment Clause Judicial Participations, Federal Courts, 2006–2015[53]

	Party-of-Appointing-President Model	Common Space Score Model
Case Type:		
Priv. Educ.	4.36 (3.85)	5.11 (4.50)
Pub. Educ. (Elementary)	0.89 (0.30)	0.88 (0.30)
Pub. Educ. (Secondary)	1.47 (0.66)	1.53 (0.68)
Pub. Educ. (High)	0.19 (0.21)	0.19 (0.21)
Religious Meetings	1.86 (0.65)	1.86 (0.65)
Religious Symbols	1.27 (0.42)	1.33 (0.44)
Judge Religion:		
Catholic	0.54* (0.17)	0.55 (0.17)
Baptist	0.50 (0.34)	0.55 (0.38)
Other Christian	0.58 (0.23)	0.60 (0.24)
Jewish	0.91 (0.34)	0.87 (0.33)
Latter-Day Saints	1.68 (0.98)	1.91 (1.13)
Other	3.74 (3.95)	3.34 (3.56)
No Religious Affiliation	0.45 (0.19)	0.44* (0.18)
Judge Sex and Race:		
Sex (Female)	0.68 (0.20)	0.68 (0.20)
African American	1.12 (0.45)	1.07 (0.43)
Asian-Latino	0.48 (0.24)	0.48 (0.24)
Judge Ideology or Attitude:		
Party of Appointing POTUS	0.55* (0.13)	---
Common Space Score	---	0.37** (0.12)
ABA Rating: Above Qualified	1.07 (0.28)	1.10 (0.29)
ABA Rating: Below Qualified	0.84 (0.39)	0.91 (0.43)
Seniority on Fed. Bench	1.00 (0.00)	1.00 (0.00)
Elite Law School	1.35 (0.33)	1.38 (0.34)

52. *Ideology All the Way Down*, *supra* note 16, at 1211; *Searching for the Soul of Judicial Decisionmaking*, *supra* note 16, at 571.

53. The dependent variable for both models is Establishment Clause Outcome=1.The models were estimated using the "meqrlogit" command in Stata (v.16.1). Standard errors, clustered on Circuits, in parentheses. * $p < .05$; ** $p < .01$.

Judge Emp. Background:		
Military	1.16 (0.33)	1.16 (0.34)
Government	0.91 (0.21)	0.88 (0.21)
State or Local Judge	1.30 (0.33)	1.27 (0.32)
Law Professor	0.72 (0.28)	0.68 (0.26)
Community Demographics:		
Catholic %	1.00 (0.02)	1.00 (0.02)
Jewish %	1.01 (0.10)	1.02 (0.10)
Non-Religious %	0.94 (0.03)	0.93* (0.03)
Precedent Variables:		
Winn	0.02** (0.03)	0.03** (0.03)
Greece	0.50 (0.59)	0.48 (0.58)
Constant	5.20 (4.92)	4.65 (4.31)
Year fixed effect	Y	Y
N	*498*	*498*

Two sets of variables proved significant in our study for 2006–2015: judge ideology and judge religion.

First, for each judge casting a vote in an Establishment Clause case in our study, appointment by a Republican President was coded as "1" and by a Democratic President as "0." Of the 498 judicial participations in our study, 280 (or 56.2%) were by judges appointed by a Republican President and 218 (or 43.8%) were by judges appointed by a Democratic President.[54] In addition, each judge was assigned a scaled proxy number for an alternative ideology measure, the Common Space Scores.[55]

Both of our proxies for judicial ideology—Party-of-Appointing-President and the judicial Common Space score—were statistically significant.[56] For cases decided in 2006–2015, holding all other independent variables constant at their means, the predicted probability that a Republican-appointed judge would vote to uphold an Establishment Clause claim is 33.0%, while the probability that a Democratic-appointed judge would uphold the claim is 45.1%. While the margin remains significant, it is markedly smaller than we found previously for the 1996–2005 period.[57] For that earlier ten-year period, the predicted probability that a Republican-appointed judge would vote to uphold an Establishment Clause claim was 25.4%, while the probability that

54. Those cohorts are remarkably similar to those in our last stage of study for 1996–2005, where the percentage of judges appointed by Republican Presidents was 56.6% and by Democratic Presidents was 43.4%. *Ideology All the Way Down*, *supra* note 16, at 1215.

55. *See infra* Section II.A.

56. See *infra* Part II.

57. See *infra* Section II.C.

a Democratic-appointed judge would uphold the claim was more than twice as high at 57.3%.[58]

For judges on the courts of appeals, we also explored the possibility of "panel effects," that is, the interactions among judges sitting on panels by measuring differences in decision outcomes through alternating configurations of three-judge panels among judges appointed by Presidents of different parties. The "panel effects" sub-field of judicial decision-making studies got its jump-start with pioneering work more than two decades ago by Richard Revesz,[59] Frank Cross, and Emerson Tiller,[60] which found that the party-based composition of panels was significantly associated with variations in the voting behavior of circuit judges in some types of cases. Cass Sunstein and his collaborators described panel effects in terms of "ideological amplification," when a judge sitting with two other judges from the same political party is more likely to vote in a stereotypically partisan direction, or "ideological dampening," when a judge from one party sitting with two judges from a different party is less likely to vote in an ideological direction.[61]

For the Establishment Clause decisions from 2006–2015, we coded judges sitting on three-judge appellate panels for the addition of one Republican-appointed judge, two Republican-appointed judges, one Democratic-appointed judge, and two Democratic-appointed judges.[62] None of these panel-effect variables achieved statistical significance in unreported alternative specifications. As we wrote previously for the earlier stage of study, "[i]n the particular context of Establishment Clause decisions, judges appear to have gone out the same door through which they came in, regardless of partisan mix on panels."[63]

The alternative Common Space Score ideology proxy was also statistically significant. Just as being appointed by a Republican President

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58. *Ideology All the Way Down*, *supra* note 16, at 1216.

59. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

60. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998).

61. CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDREW SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 8–10 (Brookings Inst. Press, 2006).

62. *See* Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1530–32 (2008) (using variables for one and two additional Democratic-appointed judges as control variables for the partisan composition of a panel). We ran each of these four variables in separate regression runs, because we found them to be overlapping and collinear. Panels on which the coded judge was joined by two additional Republicans (or Democrats) obviously also included one additional Republican (or Democrat). And if a panel included two additional Republicans, then it obviously could not include any additional Democrats (and vice versa).

63. *Ideology All the Way Down*, *supra* note 16, at 1222.

was negatively associated with a positive vote on an Establishment Clause claim, being scored conservative on the Common Space Score continuum was negatively associated with a positive vote.

Second, judges' religious affiliation proved significant for Establishment Clause decisions during this period in two ways. Even controlling for other variables, including ideology, Catholic judges were significantly more likely to reject Establishment Clause claims. Interestingly, we found the same significance and in the same direction for judges with "No Religious Affiliation." These judge religious background findings are addressed in a separate article.[64]

II. JUDGE PARTISAN OR IDEOLOGICAL INFLUENCES ON ESTABLISHMENT CLAUSE DECISIONS

A. Empirical Studies of Ideological Measures of Judges

For decades, empirical research on the judiciary has looked to the political party of the President who appointed the judge as the standard proxy for judicial ideological or political influence.[65] In our study of Establishment Clause decisions in the lower federal courts for 2006–2015, as shown in Figure 1, we found that Party-of-Appointing-President was statistically significant, with Republican-appointed judges predicted to uphold such claims at a rate of 33.0% and Democratic-appointed judges at a substantially higher rate of 45.1%.[66]

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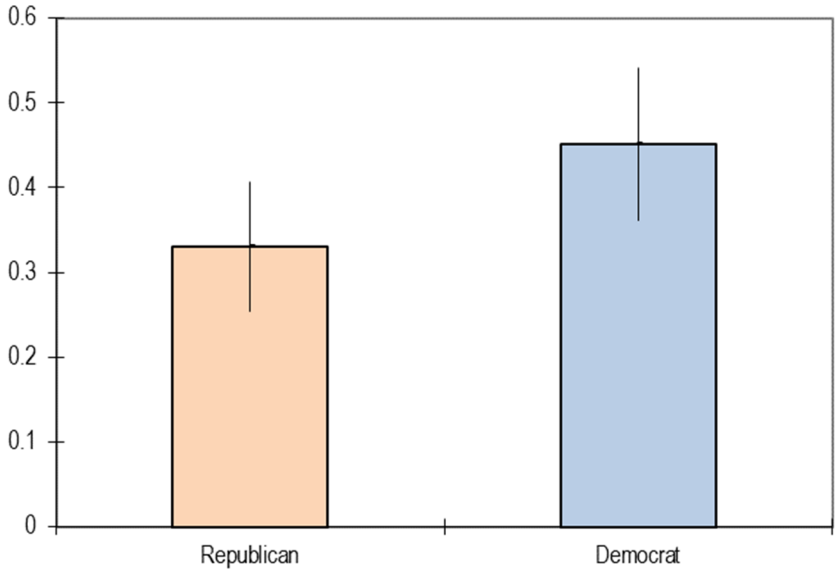
64. *See* Gregory C. Sisk & Michael Heise, *Where to Place the "Nones" in the Church and State Debate: Empirical Evidence from Establishment Clause Cases in Federal Court*, 96 ST. JOHN'S LAW REVIEW (forthcoming).

65. James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 162 (2003) (describing the line of research since the 1960s indicating "that party affiliation is a significant predictor of voting patterns by federal judges").

66. The vertical lines (commonly called "whiskers") in Figure 1 represent the 95% confidence intervals for these two predictions. By "95 percent confidence interval," statisticians mean that the interval is "one within which we are 95 percent certain that the true variable falls." ROBERT M. LAWLESS, THOMAS ULEN & JENIFER K. ROBBENOLT, EMPIRICAL METHODS IN LAW 239 (Aspen Pub., 2010). Thus, while our best estimate is that a Republican-appointed judge is likely to rule favorably on an Establishment Clause claim at a rate of 33.0%, the probability could be as low as 25.4% or as high as 40.7%. Similarly, while we predict that a Democratic-appointed judge would uphold an Establishment Clause claim 45.1% of the time, the probability could be as low as 36.1% or as high as 54.1%. Although the confidence intervals overlap, there nonetheless remains a 95% confidence that the differences in outcomes between these binary party proxies is not a product of random chance.

Figure 1: Predicted Probability of a Positive Vote by Judge on Establishment Clause Claim, by Party-of-Appointing President (2006–2015)[67]



This partisan-based measure of ideological influence continues forward from the earlier period of our study, 1996–2005, when we predicted that a Republican-appointed judge would accept an Establishment Clause claim only 25.4% of the time, while a Democratic-appointed judge would accept the claim at the significantly higher rate of 57.3%.[68] For the first stage of our study, decisions for 1986–1995, we had also found that judges appointed by Republican Presidents were significantly less likely to sustain Establishment Clause challenges.[69]

In political science, an alternative proxy has been developed, involving assignment of a "common space" ideological score to each judge, derived from positions on legislative proposals held by appointing Presidents and home state Senators of the same political party. Keith Poole and Howard Rosenthal originally created the Common Space Score measure of ideological preferences for members of Congress.[70] Micheal Giles, Virginia Hettinger, and Todd Peppers adapted this measure for study of judges, by

67. Coefficients correspond to the meqrlogit regression results reported in Tbl.2, model 1, and are reported as marginal effects evaluated at the predicted sample mean. The whiskers demark the 95% confidence interval.

68. *Ideology All the Way Down*, *supra* note 16, at 1216.

69. *Judges and Ideology*, *supra* note 16, at 767.

70. KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997).

assigning the Common Space Score for the home state Senator to a federal judge when the Senator is of the same party as the President (thus assuming that senatorial courtesy applies) and otherwise assigning the score of the President.[71] As they explain:

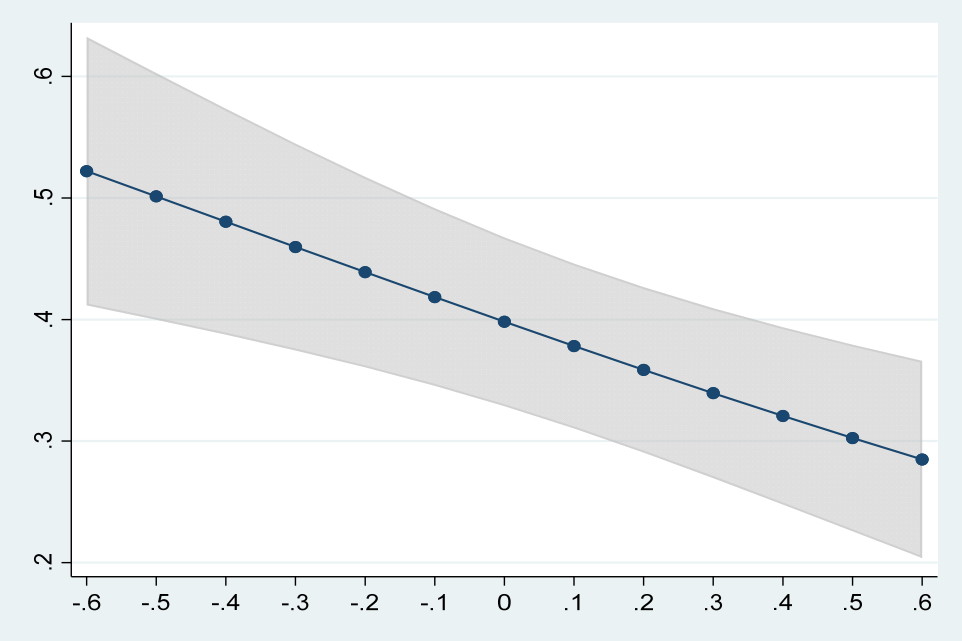
> Scores on this dimension are scaled from -1 for most liberal to +1 for most conservative. Absent senatorial courtesy the measure of senatorial preferences is assigned a value of zero [and the President's score is substituted]. If senatorial courtesy is operative and there are two senators of the president's party in a state, senatorial preferences are measured as the mean of the common space scores of the senators.[72]

For our most recent study of Establishment Clause decisions from 2006–2015, the most liberal score in our set of judges is -0.583; the most conservative is 0.693; and the mean is 0.090 (slightly right of center). In Figure 2, we generate the average predicted probabilities of a positive vote on an Establishment Clause claim for each Common Space Score in the range from -0.6 to 0.6, at increments of 0.1, while holding the other independent variables constant.

71. Micheal Giles, Virginia A. Hettinger & Todd C. Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RSCH. Q. 623 (2001); *see also Judges and Ideology*, *supra* note 16, at 783–91 (describing and critiquing the Common Space Score measure).

72 Giles, Hettinger & Peppers, *supra* note 71, at 631.

Figure 2: Predicted Probability of Positive Vote by Judge on Establishment Clause Claim, by Common Space Score Increments (Liberal<0; Conservative>0)[73]



In addition, holding all other variables constant at their means, the more liberal judges under the Common Space Score measure (at -0.5) were predicted to uphold Establishment Clause claims at a 50.1% rate, while the more conservative judges (at 0.5) were predicted to uphold such claims at a 30.3% rate.

Party-of-Appointing-President remains the most commonly used and widely accepted measure of judicial ideology,[74] as alternative ideological scores have proven to be largely interchangeable with and even redundant

73. Coefficients correspond to the meqrlogit regression results reported in Tbl.2, model 2, and are reported as marginal effects evaluated at the predicted sample mean. The shaded area demarks the 95% confidence interval.

74. David E. Adelman & Robert L. Glicksman, *Judicial Ideology as a Check on Executive Power*, 81 OHIO ST. L.J. 175, 183 (2020); Allen Huang, Kai Wai Hui & Reeyarn Zhiyang Li, *Federal Judge Ideology: A New Measure of Ex Ante Litigation Risk*, 57 J. ACCT. RSCH. 431, 433 (2019).

to[75] the party-based proxy.[76] For purposes of our Establishment Clause study, the greatest value of the Common Space Score alternative is to demonstrate the robustness of the ideological variable significance.

As important context, empirical studies of federal judicial decision-making reveal that ideological variables are not statistically significant in most areas and, when they do emerge, tend to have a marginal effect. As Frank Cross says, the "reader should not place undue importance on a finding of statistical significance, because such a finding shows a correlation between variables but by itself does not prove the substantive significance of that correlation."[77]

In his comprehensive study of thousands of decisions in the federal courts of appeals over many decades, Cross found that ideology had a fairly small impact, weaker than legal factors in its explanatory power.[78] While ideology does have a statistically significant association with judicial outcomes, "the measured effect size for ideology is always a fairly small one."[79]

In an earlier one-dimensional study of ideology in the federal courts, without multi-variable analysis, Cass Sunstein, David Schkade, and Lisa Ellman found ideology significant, but only in a particular set of such controversial cases as constitutional challenges to affirmative action, claims of sex discrimination, suits to hold company directors liable for corporate wrongdoing, and industry challenges to environmental regulations.[80] As confirmed in a follow-up study by Sunstein and Thomas Miles, the number of "ideologically decided" cases in such controversies will be very small on an annual basis.[81]

Likewise, in a broader empirical study of judges in the federal courts of appeals, Lee Epstein, William Landes, and Richard Posner found, after multivariate regression for both civil and criminal cases, an overall voting

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75. *Judges and Ideology*, *supra* note 16, at 789; Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 204 (2009); see also René Reyes & Jessica W. Reyes, *Religion in Empirical Decision-Making: An Empirical Analysis*, 2019 BYU L. REV. 293, 319 (finding that common space scores for ideology were "tightly connected" to party-of-appointing-president, with nearly all Democratic-appointed judges to the left and Republican-appointed judges to the right).

76. Ross M. Stolzenberg & James Lindgren, *Judges as Party Animals: Retirement Timing by Federal Judges and Party Control of Judicial Appointments* 9 (Nw. U. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 21-10, 2021).

77. FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 4 (2007).

78. *Id.* at 9, 28, 165–68, 228–29.

79. *Id.* at 38.

80. Cass R. Sunstein, Lisa Michelle Ellman, David Schkade, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 311–33 (2004).

81. Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, at 788 tbl.3 (2008).

difference between Republican- and Democratic-appointed judges at about 4.5%.[82]

In sum, as we've written previously, the steadily growing body of empirical research on the lower federal courts "reveals that ideology explains only a relatively modest part of judicial behavior and emerges on the margins in controversial and ideologically contested cases."[83]

Recent empirical studies confirm this pattern.[84] For example, in exploring whether judicial ideology acts as a mediating check on partisan use of executive power in environmental policy, David Adelman and Robert Glicksman found party-of-appointing-president to be a significant but not powerful variable in administrative review cases.[85] Examining federal appellate review of agency policies under environmental laws during the George W. Bush and Obama Administrations, they found that "judicial ideology affects case outcomes in less than five percent of the appellate cases."[86] Indeed, they found that "judicial ideology is not a predominant factor in case outcomes" compared to the "substantially greater importance" of such factors as the administration, the circuit, and the class of the plaintiff.[87]

As another recent example, Neal Devins and Allison Larsen explored whether calls for en banc review in the federal circuits were being "weaponized" by judges acting within blocs aligned by the party of the President who appointed them.[88] Encouragingly, they found that partisan splits in en banc decisions over several decades did not appear regularly or in a predictable pattern.[89] They concluded that "[s]ignificant forces seem to be pushing against the en banc partisan impulse—forces like rule-of-law norms, collegiality, and judicial independence."[90] However, looking at the most recent time period, 2018–2020, they found a surge in partisan behavior,[91]

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82. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD POSNER, THE BEHAVIOR OF JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 168 (2013).

83. *Judges and Ideology*, *supra* note 16, at 746.

84. *See, e.g.*, Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. 231, 251, 273 (2020) (finding that party-of-appointing-president was strongly correlated with federal appellate decisions on certification of class actions in 2002–2017); Huang, Hui & Li, *supra* note 74, at 435–36 (finding that securities class actions are more likely to be filed in liberal circuits).

85. Adelman & Glicksman, *supra* note 74, at 178.

86. *Id.*

87. *Id.* at 213.

88. Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373 (2021).

89. *Id.* at 1379–80.

90. *Id.* at 1380.

91. *Id.* at 1413–16.

raising the question of whether "we are at an inflection point" in the use of en banc as "a partisan weapon."[92]

Adam Samaha and Roy Germano included and adapted data from our studies of religious liberty decisions in their empirical exploration of five domains of law in which ideological influences might be expected to emerge.[93] They confirmed our earlier findings of a statistically significant correlation between ideology and rulings in Establishment Clause cases, as well as in abortion right and affirmative action cases.[94] They also found ideological division in a subset of commercial speech cases involving laws imposing duties of disclosure and warnings on commercial entities.[95]

Also directly pertinent to our study, Sepehr Shahshahani and Lawrence Liu adapted data from our prior stages of study and extended it forward in their study of religious liberty decisions in the federal circuits, including Establishment Clause cases.[96] In their combined dataset of religious liberty cases across the full thirty-year period, Shahshahani and Liu found that Party-of-Appointing-President was significant for judge voting in Establishment Clause cases.[97]

While the Shahshahani and Liu study confirmed our basic party-based finding for Establishment Clause cases, differences between our two studies should be noted, both in terms of our datasets and how we set out different time periods. The Shahshahani and Liu study focused on decisions by the federal courts of appeals and was limited to published decisions.[98] Our study includes both district court judges and court of appeals judges and more expansively includes unpublished written decisions at both court levels.[99] By including a larger set of judges and unpublished decisions, the number of

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92. *Id.* at 1381. In discussing what we describe as a waning of ideological influence in Establishment Clause cases, we'll return to this question of whether the Trump era is heightening partisan leanings in the federal judiciary. *See infra* Section I.C.

93. Samaha & Germano, *supra* note 45, at 827, 843.

94. *Id.* at 871.

95. *Id.* at 831.

96. Shahshahani & Liu, *supra* note 46, at 720.

97. *Id.* at 730–31. In contrast with our non-findings on panel effects for the two ten-year periods of 1996–2005 and 2006–2010, see *supra* notes 59–63 and accompanying text, Shahshahani and Liu also found party to be significant in their study of panel effects. Shahshahani & Liu, *supra* note 46, at 731.

98. Shahshahani & Liu, *supra* note 46, at 717, 720 n.7.

99. *See supra* Section I. Because we included both federal trial and appellate judges, we could not include an additional variable for the outcome below, as did Shahshahani and Liu. Shahshahani & Liu, *supra* note 46, at 722. As we explained previously, by including both sets of judges in our study, "we first needed to place trial court rulings in the same decisional space as appellate court rulings." *Religion, Schools, and Judicial Decision Making*, *supra* note 16, at 192.

observations for Establishment Clause cases in our study is doubled.[100] For the most recent ten-year period, our study is based on 498 observations.[101] A larger dataset, more closely approximating the universe of Establishment Clause decisions, especially in the federal courts of appeals,[102] strengthens confidence in the findings.

Moreover, while Shahshahani and Liu examined results from the overall dataset of thirty years of religious liberty decisions in the federal courts from 1986–2015,[103] our study separately reports on each ten-year period.[104] As we discuss further below,[105] we are able to identify changes in patterns from one period to another. Notably, we discover an apparent waning of the impact of judicial ideology on Establishment Clause decisions in this most recent time period of 2006–2015.

B. Diagnosing an Ideological Infection in Establishment Clause Decisions

In the traditional American understanding of constitutional democracy, judges are to be independent and stand apart from the political branches, dedicated to resolving disputes through an impartial application of neutral principles of law.[106] Benjamin Wittes describes this as the "civic expectation that judges will behave like judges."[107] In particular, we want judges to separate themselves from political cohorts, being clothed in the impartial robe of the judicial role.[108] Judges, of course, remain human beings who bring life

100. Shahshahani and Liu reported 665 observations in Establishment Clause cases for the thirty-year period of their study. Shahshahani & Liu, *supra* note 46, at 731. For the three ten-year periods of our study, we reported (1) 286 observations for 1986–1995; (2) 555 observations for 1996–2005, and (3) 498 for 2006–2015. *Searching for the Soul of Judicial Decisionmaking*, *supra* note 16, at 571; *Ideology All the Way Down*, *supra* note 16, at 1211; *see supra* Part I. Thus, our total for the entire thirty-year span of Establishment Clause cases is 1339.

101. *See supra* Part I.

102. *See supra* notes 43–44 and accompanying text.

103. Shahshahani & Liu, *supra* note 46, at 720.

104. *See supra* Part I.

105. *See infra* Section II.C.

106. *See generally Judges and Ideology*, *supra* note 16, at 776–77 (discussing the aspirational ideal of the judge as neutral and objective).

107. Benjamin Wittes, *Judges and Politics*, WASH. EXAM'R (Oct. 6, 2003, 12:00 AM) (reviewing CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003)), https://www.washingtonexaminer.com/weekly-standard/judges-and-politics [https://perma.cc/MP6V-PS63].

108. Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 831–32 (1990) ("The structure of the 'independent' judiciary is designed to remove judges from the day-to-day pressures and temptations of ordinary political office . . . .").

experience and individual values to their work.[109] At the same time, the "simple but powerful" idea remains, as Neal Devins and Allison Larsen well say, that "partisan loyalties fade away after investiture to reveal a judiciary of men and women bound together by collegiality norms and the rule of law."[110]

For these reasons, any substantial trace of partisan ideological influence on judicial decisions should be jarring, even accepting that such subjective influences cannot be cleansed wholly away simply by ascension to the bench.

To be sure, while a partisan correlation with judicial outcomes in Establishment Clause decisions may be a literally accurate description, that influence does not necessarily indicate perseverance of partisan loyalties as such.[111] As Donald Braman and Dan Kahan explain, "[i]t's not that political values *motivate* legal actors to reach particular outcomes but rather that cultural values *orient* them in determining what outcome is dictated by the law and evidence at hand."[112] In other words, our model findings may predict that Republican-appointed federal judges are significantly and substantially less likely to accept an Establishment Clause challenge to government accommodation of religion. But, even accepting our findings as confirming the influence of judicial attitudes, it hardly means that any judge rules on a case with the desire to curry favor with Republican politicians or advance a political party campaign platform.

Rather, the Republican-leaning professionals who are most likely to be nominated to the federal bench by a Republican President are also more likely to be persons who take an accommodation approach toward those church and state questions that lie at the heart of Establishment Clause disputes. As Howard Gillman and Erwin Chemerinsky wrote, "views on religion and government, and the appropriate content of the First Amendment, are very much defined by political ideology."[113]

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109. *See* Gregory C. Sisk, *Judges Are Human, Too*, 83 JUDICATURE 178, 211 (2000).

110. Devins & Larsen, *supra* note 88, at 1375.

111. *Cf.* Dan M. Kahan, David Hoffman, Danieli Evans, Neal Devins, Eugene Lucci & Katherine Cheng, "*Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 354–55 (2016) (finding in an ideologically-biased-reasoning experiment involving sitting judges that professional judgment "can be expected to counteract 'identity-protective cognition'" of the type that "generate[s] political polarization").

112. Donald Braman & Dan M. Kahan, *Legal Realism as Psychological and Cultural (Not Political) Realism*, *in* HOW LAW KNOWS 93, 94 (Austin Sarat et al. eds., 2006).

113. HOWARD GILLMAN & ERWIN CHEMERINSKY, THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE 7 (2020).

At an accelerating pace over recent decades, a "devotional divide"[114] has "become embodied in the two major political parties and their platforms."[115] Thus, not surprisingly, judges appointed by Republican presidents are more likely to be religiously devout and supportive of a robust role for religion in public.[116]

Nonetheless, we should be troubled by a pattern of partisan-correlated leanings in court rulings, even if not initially motivated by party loyalties. Having opened the door to political influences in resolving court questions in a field of law, the judge may subconsciously begin to associate the correct answer with those colleagues who share the same party-based appointment. A subjective standard that allows the judge to call upon individual ideological beliefs may over time begin to draw together cohorts of like-minded judges who, not so incidentally, are connected by the party of the President that appointed them.

As indirect evidence of a partisan temptation, consider the empirically-confirmed tendency of federal judges to retire when the same party holds the presidency as when the judge was appointed.[117] In their study, Ross Stolzenberg and James Lindgren consider the following: "If federal judges start and end their careers politically, then it seems reasonable to think that they are political in mid-course too, as they administer justice and interpret law in civil and criminal matters."[118] The conclusion is not ineluctable, however, as a judge's decision to afford appointment of a replacement to the same party may be merely a courtesy or expectation that does not reflect deeper party-based loyalties.

More unsettling, Neal Devins and Allison Larsen found evidence of an increase in actual partisan-based cohort behavior through a statistically significant uptick during 2018–2020 of en banc behavior that is tied directly to party-of-appointing-president.[119] In contrast with their finding that judges across six decades had not shown a substantial tendency to divide along party lines in en banc decisions, this recent steady rise offered an "important twist"

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114. Campbell, *supra* note 27, at 63–64.

115. *Religion, Schools, and Judicial Decision Making*, *supra* note 16, at 203. For a general discussion of the religious divide in partisan identification, see generally *Ideology All the Way Down*, *supra* note 16, at 1231–38.

116. *See* Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. (forthcoming 2022) (manuscript at 19) (in press) (stating that the most pro-religion members of the Supreme Court are "all Christian, mostly Catholic, religious devout (though this variable provides a weaker explanation that the others), and ideologically conservative.").

117. STOLZENBERG & LINDGREN, *supra* note 76, at 1.

118. *Id.* at 28.

119. Devins & Larsen, *supra* note 88, at 1413–16.

to their story.[120] The durable forces of "rule-of-law norms, collegiality, and judicial independence"[121] may be breaking down. Again, once the party-based infection takes hold, it may be harder to cure.

The source of the problem in the Establishment Clause context has been the absence of a clear rule of law for deciding cases. As we've written previously:

> Even when a judge sincerely wishes to leave his [or her] politics at the courtroom door, if [the judge] finds no law to apply to a case, the judge still must resolve the dispute and so must fall back on some nonlegal measure or extralegal thesis by which to decide the case. If the subject is one as controversial, prominent, and subject to divergent opinion as the role of religion and religious influences in public life, the judge left to draw on nonlegal values will be hard-pressed not to trend toward his [or her] own personal views.[122]

In sum, the source of the contagion may be found in the "absence of constraining legal doctrine [that] leaves judges without clear guideposts in resolving Establishment Clause disputes."[123]

A complete etiology of the Supreme Court's "often puzzling Establishment Clause jurisprudence"[124] is not necessary to confirm the unsettled state of the law. Indeed, as Steven Smith bluntly reports, "[p]robably the most common adjective used in descriptions of the contemporary jurisprudence of religious freedom is 'incoherent.'"[125] The "long and winding road"[126] began with *Lemon v. Kurtzman*,[127] in which the Supreme Court articulated a three-part test for determining whether a government has violated the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[128] Over the decades, the strictly separationist *Lemon* test unraveled and came to

120. *Id.* at 1413.

121. *Id.* at 1380.

122. *Ideology All the Way Down*, *supra* note 16, at 1244 (footnote omitted).

123. *Id.* at 1240.

124. Town of Greece v. Galloway, 572 U.S. 565, 597 (2014) (Alito, J., concurring).

125. Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1871 (2009) (reviewing KENT GREENAWALT, RELIGION AND THE CONSTITUTION – VOLUME 2: ESTABLISHMENT AND FAIRNESS (2008)) (quoting Stephen G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMENDMENT L. REV. 1, 4 (2006)).

126. *See* THE BEATLES, *The Long and Winding Road*, *on* LET IT BE (Apple and EMI 1970).

127. 403 U.S. 602 (1971).

128. *Id.* at 612–13 (citation omitted) (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)).

"resemble[] a constitutional Rorschach test, reflecting the often contradictory constitutional views of different observers."[129]

In recent years, the jurisprudential debate has continued between what Patrick Garry calls "two basic, opposing positions."[130] On one side of the divide, we find "separationists [who] see the Establishment Clause as protecting a secular society, with religion as a strictly private enterprise that should not enter the public square."[131] On the other are the "accommodationists [who] believe the Establishment Clause serves to protect religious liberty and support a thriving religious pluralism in the public square, permitting the government to accommodate religion's historic public presence."[132] The decisions emerging from this ongoing debate within the Supreme Court has produced Establishment Clause decisions that are "difficult to reconcile."[133]

In a decision rendered just past the mid-point of the 2006-2015 period of our study, an en banc majority of the United States Court of Appeals for the Seventh Circuit concluded that a public high school had violated the Establishment Clause by holding commencement ceremonies in a local church that offered a larger and air-conditioned venue.[134] In dissent, Judge Posner described the Supreme Court's case law as "formless, unanchored, subjective and provid[ing] no guidance."[135] He found it implausible and factually unsupported to say that "mere exposure to religious imagery" in the church imposed an unconstitutional taint that precluded using a much better-suited space for the comfort and capacity of those attending high school graduation.[136] He cited to our earlier study finding a judge's political orientation to be what he called "a particularly important clue [as] to his or her likely vote in a case arising under the religion clauses of the First Amendment."[137] Posner explained:

> With no guidance from the Constitution or the social sciences, judges inevitably fall back on their priors, that is, on beliefs based

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129. Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 467 (1994); *see also* McConnell, *supra* note 47, at 105 (describing the *Lemon* test as "turn[ing] out to entail ambiguous and subjective judgments, with no predictability and little hope of order.").

130. Patrick M. Garry, *Establishment Clause Jurisprudence Still Groping for Clarity: Articulating a New Constitutional Model*, 12 NE. U. L. REV. 660, 675 (2020).

131. *Id.*

132. *Id.*

133. GILLMAN & CHEMERINSKY, *supra* note 113, at 80.

134. Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 842–43 (7th Cir. 2012) (en banc).

135. *Id.* at 872 (Posner, J., dissenting).

136. *Id.* at 876.

137. *Id.* at 873 (first citing *Religion, Schools, and Judicial Decision Making*, *supra* note 16; and then citing *Ideology All the Way Down*, *supra* note 16).

> on personality, upbringing, conviction, experience, emotions, and so forth that people bring to a question they can't answer by the methods of logic and science or some other objective method.[138]

So, if we conceive of the "intolerable subjectivity" introduced by the Supreme Court into Establishment Clause doctrine as "judicial malpractice,"[139] what then is the prescribed treatment? The antidote to political judging must come from the rule of law, a reform of Establishment Clause doctrine that surgically removes open-ended prongs and shapeless standards of the kind that substitutes subjectivity for legal analysis.

The leader in the scholarly response to the general question of extra-legal influences, including ideology, has been Frank Cross. Cross analogizes the law to "ropes binding a judicial Houdini" and urges us to evaluate empirical findings to better "understand which brand of rope and which type of knot are most effective and inescapable."[140] For example, in his comprehensive study of federal appellate decision-making, Cross found that the command of deference by appellate courts to trial judges (as to certain findings and decisions) has a power that "clearly exceeds all the other variables that have been tested."[141]

In this search for a better brand of rope, we need not indulge in a naïve formalism that pretends all discretion can be removed. The perfect should not be the enemy of the good. Michael Perino rightly says that law, while "not completely determinate," may "still act as a constraint that limits the discretionary space in which a judge may operate."[142] Shifting "toward clearer rules and away from flexible standards" may "reduce the discretion of individual decision-makers and consequently the influence of their ideologies on case outcomes."[143]

And there is every reason to believe that lower federal court judges would welcome the guidance. As Brian Tamanaha observes, "[f]or legally oriented judges, the law is not chains or ropes they are trying to wriggle out of but rather guideposts they are actively searching for and following to reach their destination."[144]

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138. *Id.*

139. *Ideology All the Way Down*, *supra* note 16, at 1244, 1261.

140. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 326 (1997).

141. CROSS, *supra* note 77, at 178.

142. Michael A. Perino, *Law, Ideology, and Strategy in Judicial Decision Making: Evidence from Securities Fraud Actions*, 3 J. EMPIRICAL LEGAL STUD. 497, 505 (2006).

143. *See* Samaha & Germano, *supra* note 45, at 893 (describing possible tightening of commercial speech doctrine to reduce ideological influence).

144. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 118–19 (Princeton Univ. Press 2010).

If any area of the law demands more rigorous and carefully-defined rules, it may be "the area of religious freedom," where Thomas Berg warns that "balancing and case by case [decision-making] hold particular dangers."[145] Precisely because "[r]eligion is a matter on which people, judges included, tend to have gut feelings," doctrinal standards that invite "[c]ase by case, intuitive judgments about [religion clause] matters are likely to be unacceptably subjective."[146] In the arena of the Establishment Clause, balancing tests with multiple prongs or open-ended factors "leaves in the judiciary far too much unguided discretion that was never conferred by the text [of the Establishment Clause]."[147]

So, is there a basis for hope that the ideological infection into the decision of Establishment Clause cases can be mitigated, if not entirely removed? Richard Garnett contends that "the better course is to find (somehow) some bright-line, on-off 'rules' and 'tests.'"[148] Toward that end, Garnett argues

> [N]ot only that judges should be *deferential*—applying a 'rule of clear mistake'—when evaluating legislative action in light of the establishment clause, but that they should settle for constructing and enforcing only those clear and straightforwardly administrable rules that are essential to vindicating the clause's core, clear meaning and guarantees."[149]

As discussed next, there is good news in our most recent study of Establishment Clause cases from 2006–2015. The empirical evidence suggests that better medicine, in the form of clearer legal parameters and structured presumptions, can make a meaningful and measurable difference and lead to a healthier and more legally grounded approach to adjudication.

C. Evaluating the Treatment of the Ideological Infection in Establishment Clause Cases

Instead of highlighting the persistent influence of ideology in Establishment Clause cases for 2006–2015, we might have titled this Article to emphasize the *waning* of ideological influence. As we discuss below, while the party-based ideological proxy remained significant for this most recent

145. Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 701 (1997).

146. *Id.*

147. Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, UTAH L. REV. 489, 621–22 (2011).

148. Richard W. Garnett, *Judicial Enforcement of the Establishment Clause*, 25 CONST. COMMENT. 273, 277 (2008).

149. *Id.* at 275 (citation omitted).

period of our study, the power of the influence was markedly lower. In addition, a precedent variable proved even more powerful, suggesting the growing impact of legal constraints on Establishment Clause decisions.

Given the deleterious effect of ideological divisions, especially when related to partisan variables, we conclude that it is more important to draw attention to the continuing pathology. But on a more optimistic note, we should also discuss the possibility that a treatment is gradually being applied and beginning to show results.

1. The Ideological Infection in Establishment Clause Decisions is Subsiding

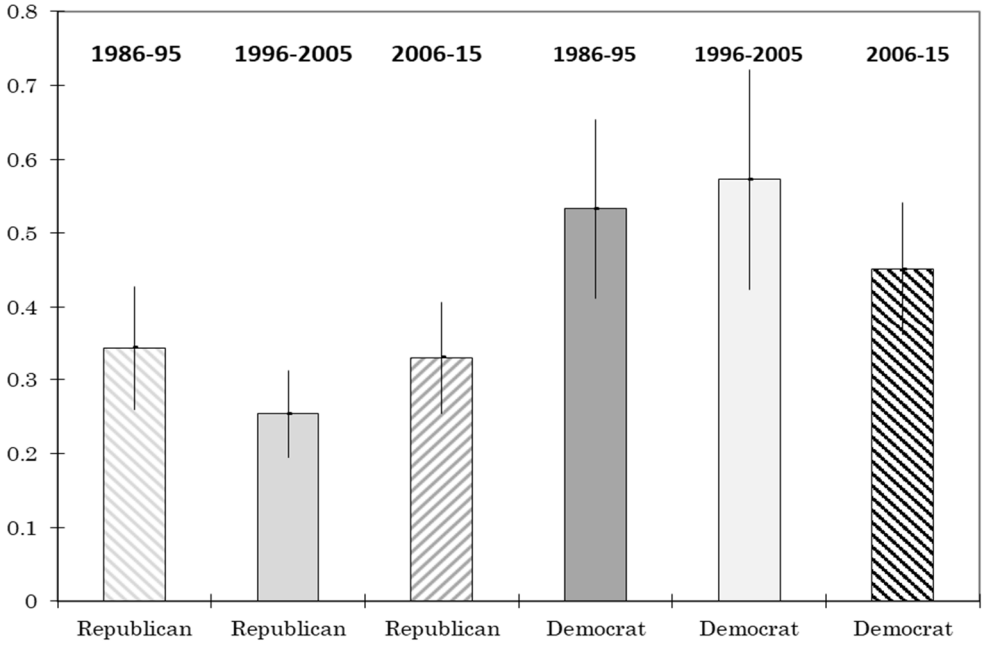
While statistical significance measures our confidence that a correlation between a dependent variable and the independent variable is not a product of random chance, as Frank Cross rightly emphasizes, "[o]ne must also consider the magnitude of the association."[150] And here is where hope shines brightly. The magnitude of the ideological divide on Establishment Clause rulings in the lower federal courts has fallen dramatically and systematically for the most recent period of study.

For the prior ten-year period of 1996–2005, we found that an Establishment Clause claimant's likelihood for success "was predicted to be 2.25 times higher before a Democratic-appointed than [] a Republican-appointed judge."[151] As shown in Figure 3, holding all other independent variables constant at their means, the predicted probability for 1996–2005 that a Republican-appointed judge would vote to uphold an Establishment Clause claim was 25.4%, while the probability that a Democratic-appointed judge would uphold the claim was 57.3%—a margin difference of 32%.[152]

By comparison in Figure 3, for 2006–2015, the predicted successful outcome before a Democratic judge in an Establishment Clause claim had fallen to 45.1%, while it had risen before a Republican judge to 33.0%. The margin of 12% shows a systematic reduction approaching two-thirds from the earlier period.

150. CROSS, *supra* note 77, at 4.
151. *Ideology All the Way Down*, *supra* note 16, at 1216.
152. *Id.*

Figure 3: Predicted Probability of Positive Vote by Judge on Establishment Clause Claim, by Party of Appointing President and by Time Period[153]



As illustrated in Figure 3, when holding all other independent variables constant, the predicted probability of a positive ruling on Establishment Clause claims by Republican-appointed judges fell substantially between 1986–1995 and 1996–2006, from a rate of 34.4%[154] in 1986–1995 to a rate of only 25%[155] in 1996–2005. For the most recent period, 2006–2015, that predicted rate for a Republican-appointed judge climbed to 33%.

For Democratic-appointed judges, the predicted probability of a favorable ruling on an Establishment Clause claim increased slightly between the first

153. Coefficients correspond to the meqrlogit regression results reported in Tbl.2, model 1, and are reported as marginal effects evaluated at the predicted sample mean. The whiskers demark the 95% confidence interval.

154. The 95% confidence interval for predicted success rate before a Republican-appointed judge in the 1986–1995 data set ranged from 26.0% to 42.7%. *Ideology All the Way Down*, *supra* note 16; *Judicial Decisionmaking*, *supra* note 16.

155. The 95% confidence interval for predicted success rate before a Republican-appointed judge in the 1996–2005 data set ranged from 19.5% to 31.3%. *Ideology All the Way Down*, *supra* note 16; *Judicial Decisionmaking*, *supra* note 16.

two ten-year periods of our study, from a rate of 53%[156] in 1986–1995 to a rate of 57%[157] in 1996–2005. Then, for the most recently-studied period of 2006–2015, the success rate before Democratic-appointed judges dropped rather dramatically to 45%.

In sum, as of 2015, the influence of Party-of-Appointing-President was sharply declining in Establishment Clause cases in the lower federal courts. The estimated margin between Republican-appointed and Democratic-appointed judges on Establishment Clause case outcomes remains significant and measurable but is drawing closer together.

2. Clarifying Establishment Clause Precedent Appears To Be a Powerful Counteragent

What might explain this abatement of the party-correlated ideological influence? We have empirical evidence to suggest that a steady clarification and tightening of the Supreme Court's Establishment Clause doctrine is having a meaningful if delayed effect in the lower federal courts. Beginning during the 1996–2005 period of study and extending into the 2006–2015 period, the Supreme Court appears to be shifting away from non-deferential and open-ended balancing tests for evaluating government interaction with religion and moving toward rule-like guideposts combined with deference to the political branches.

Mark Richards and Herbert Kritzer postulate that the Supreme Court establishes legal directives through a "jurisprudential regime," that is, "a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal area."[158] Applying the jurisprudential regime concept to the Supreme Court's *Lemon* test[159] for the Establishment Clause, Richards and Kritzer found that the *Lemon* regime "served to provide a framework for

156. The 95% confidence interval for predicted success rate before a Democratic-appointed judge in the 1986–1995 data set ranged from 41.1% to 65.4%. *Ideology All the Way Down*, *supra* note 16; *Judicial Decisionmaking*, *supra* note 16.

157. The 95% confidence interval for predicted success rate before a Democratic-appointed judge in the 1996–2005 data set ranged from 42.4% to 72.1%. *Ideology All the Way Down*, *supra* note 16; *Judicial Decisionmaking*, *supra* note 16.

158. Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 308 (2002).

159. On the *Lemon* test, see *supra* notes 127–128 and accompanying text.

the decisions [in the Supreme Court] in Establishment Clause cases" over a period of 30 years.[160]

In the prior stage of our study from 1996–2005, we included a precedential variable for the Supreme Court's 1997 decision in *Agostini v. Felton*.[161] In *Agostini*, the Supreme Court overturned two prior precedents[162] and approved the governmental provision of remedial education services on the premises of parochial schools when "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[163] Turning hard against a strict separationist regime for the Establishment Clause,[164] the Supreme Court in *Agostini* rejected the presumption that simply placing public employees on parochial school grounds fomented an excessive entanglement between government and religion.[165] In addition, the Court adopted a non-discrimination test to evaluate the legitimacy of government aid distributed to a religious entity.[166] If the government aid is distributed pursuant to secular criteria and on equal terms to all beneficiaries, "the aid is less likely to have the effect of advancing religion" in violation of the Establishment Clause.[167] As Michael McConnell and Thomas Berg concluded, the Supreme Court's *Agostini* decision moved the jurisprudential "trajectory toward a 'neutrality' interpretation of the Establishment Clause"[168] that "treat[s] religious entities equally in evaluating aid."[169]

As we found in the earlier stage of our study, *Agostini* appeared to produce a measurable change in the response of the lower federal courts to Establishment Clause claims. As shown in Figure 4, for the 1996–2005 period, holding all other independent variables constant in our Party-of-Appointing-President model, our best estimate was that the success rate for

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160. Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The* Lemon *Regime and Establishment Clause Cases*, 37 LAW & SOC'Y REV. 827, 839 (2003).

161. 521 U.S. 203 (1997).

162. *Id.* at 235–37.

163. *Id.* at 231.

164. Thomas C. Berg, *Race Relations and Modern Church-State Relations*, 43 B.C. L. REV. 1009, 1023 n.95 (2002) (describing *Agostini* as overruling "separationist decisions from the 1970s").

165. *Agostini*, 521 U.S. at 222–35.

166. *Id.* at 230–31.

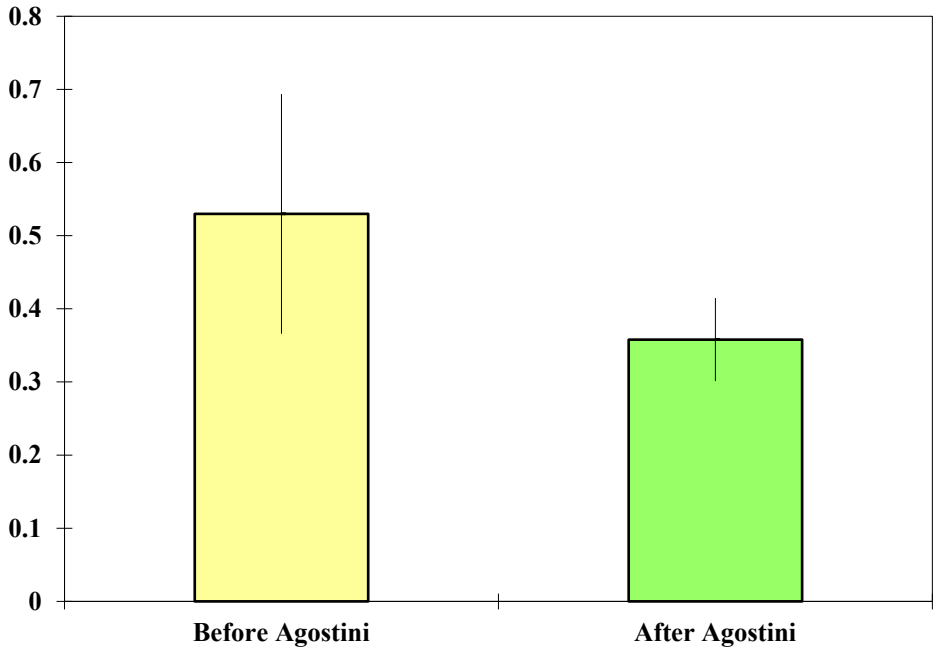
167. *Id.* at 231.

168. Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 689 (2001).

169. Berg, *supra* note 164.

Establishment Clause claimants fell from 53.0%[170] to 35.8%[171] with the intervention of the Supreme Court's *Agostini* precedent.[172]

Figure 4: Predicted Probability of Success for Establishment Clause Claims, Before and After *Agostini v. Felton*[173]



For our most recent study of the 2006–2015 period, another Supreme Court precedential variable was significant, confirming the continuing importance of rule-of-law factors in the Establishment Clause context. The variable for the Supreme Court's decision in *Arizona Christian School Tuition Organization v. Winn*[174] was significant at the 99% confidence level in both of our models.[175]

170. The 95% confidence interval for predicted success rate before *Agostini* ranges from 36.6 to 69.4.

171. The 95% confidence interval for predicted success rate after *Agostini* ranges from 30.1 to 41.5.

172. *Ideology All the Way Down*, *supra* note 16, at 1257.

173. We have borrowed this figure from our earlier study, where it appears at *id.*

174. 563 U.S. 125 (2011).

175. *See supra* Part I.

In *Winn*, the Supreme Court employed a narrow test for judicial standing to deflect Establishment Clause challenges by a group of taxpayers against a state program allowing tax credits for contributions to qualifying non-profit organizations.[176] In a narrow 5-4 decision, the Court dismissed plaintiff-taxpayer claims that the Establishment Clause was violated when the state granted tax credits for individual contributions to organizations that subsidize tuition for religiously-affiliated private schools.[177] Observing that any funds received by the religious schools were because of the decisions of a taxpayer to contribute to the organization, the Court emphasized that the case involved private action rather than state activity.[178] In the majority's view, that "distinction between governmental expenditures and tax credits refutes [plaintiff-taxpayers'] assertion of standing."[179]

As the Supreme Court has long held, "[o]ne element of the 'bedrock' case-or-controversy requirement is that plaintiffs must establish that they have standing to sue," that is, standing to invoke the power of a federal court to review the conduct of government.[180] Standing requires the plaintiff to have "such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues."[181] Generalized and abstract grievances about the conduct of the government are generally insufficient to establish the personal injury required for standing.[182]

In the 1968 decision in *Flast v. Cohen*,[183] however, the Supreme Court carved out a significant exception in Establishment Clause cases to the general rule that taxpayer complaints about government financial activity are too generalized to support standing.[184] Viewing the Establishment Clause as a direct constraint on the congressional spending power, the *Flast* Court conferred standing on taxpayers who alleged that "the challenged expenditures" for parochial schools violate the Clause.[185]

Although not overruling *Flast*, the *Winn* majority rejected standing for taxpayer Establishment Clause claims when the funding to a religious entity is not directly conveyed by the government but instead involved a tax credit to private actors who made the contribution to the religiously-affiliated

176. *Winn*, 563 U.S. at 129–30.
177. *Id.* at 129–31.
178. *Id.* at 142–43.
179. *Id.* at 142.
180. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 225 (2003).
181. Baker v. Carr, 369 U.S. 186, 204 (1962).
182. Lance v. Coffman, 549 U.S. 437, 442 (2007).
183. 392 U.S. 83 (1968).
184. *Id.* at 103.
185. *Id.* at 102–03.

organization.[186] Two members of the majority would have overruled *Flast* as an "anomaly in our jurisprudence" and thereby excluded all taxpayer plaintiffs from pursuing Establishment Clause claims.[187] The dissent said that *Winn* "devastates taxpayer standing in Establishment Clause cases," regarding government "[a]ppropriations and tax subsidies [as] readily interchangeable."[188]

At the very least, the Supreme Court's 2011 decision in *Winn* narrowed standing and thus reduced the occasions for a judicial finding of an Establishment Clause violation. More dramatically, some commentators characterized the decision as moving directly toward elimination of taxpayer standing in Establishment Clause cases.[189] Indeed, some viewed the *Winn* decision as a first step toward restricting the substance of the constitutional provision through "a new version of the Establishment Clause that tolerates indirect government financial preference for particular faiths."[190] Looking beyond government expenditure or tax credit matters, commentators wondered whether the *Winn* Court's disparagement of generalized claims of psychic harm might undermine claims of alienation by plaintiffs challenging government displays of religious symbols.[191] In sum, *Winn* is a landmark decision that meaningfully redirects Establishment Clause jurisprudence.

In Figure 5, for the 2006–2015 period, holding all other independent variables constant in our Party-of-Appointing-President model, our best estimate was that the success rate for Establishment Clause claimants fell from 59.7%[192] to 15.8%[193] after the Supreme Court decided *Winn*.[194] As the figure illustrates, the impact was quite dramatic, a decline of more than forty points or nearly three-quarters.

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186. *Winn*, 563 U.S. 125, 139–43 (2011).

187. *Id.* at 146–47 (Scalia, J., concurring).

188. *Id.* at 168 (Kagan, J., dissenting).

189. William P. Marshall & Gene R. Nichols, *Not a Winn-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215, 216 (2012); Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing To Challenge Faith-Based Spending*, 32 CARDOZO L. REV. 1009, 1096–97 (2011). *But see* Bryan Dearinger, *The Future of Taxpayer Standing in Establishment Clause Tax Credit Cases,* 92 OR. L. REV. 263, 270 (2013) (suggesting that *Winn* did not portend rejection of taxpayer standing but rather reflects a stabilization of Religion Clause doctrine).

190. Rahdert, *supra* note 189, at 1096–97.

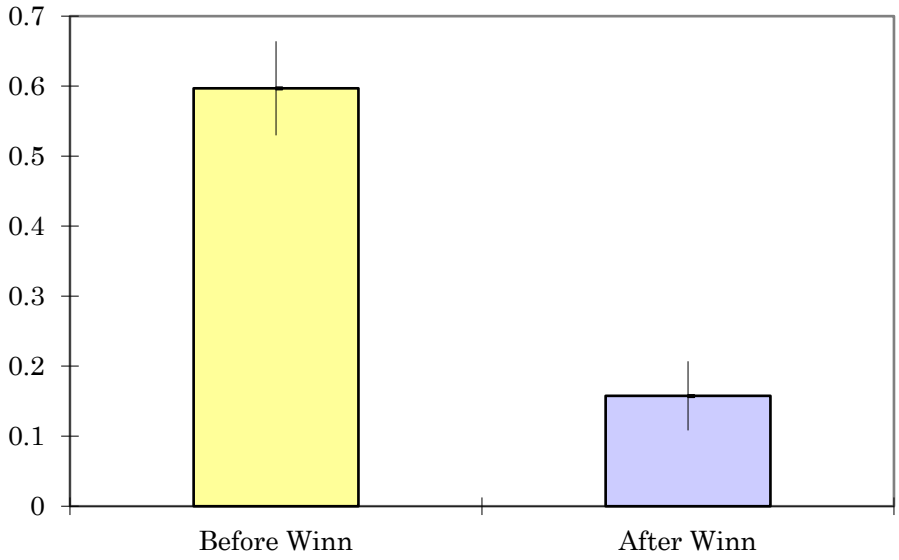
191. Marshall & Nichols, *supra* note 189, at 246–47; *see also* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2098–2102 (2019) (Gorsuch, J., concurring) (disputing the "offended observer" basis for standing in Establishment Clause cases involving religious symbols).

192. The 95% confidence interval for predicted success rate before *Winn* ranges from 53.0% to 66.4%.

193. The 95% confidence interval for predicted success rate after *Winn* ranges from 10.8% to 20.7%.

194. *Ideology All the Way Down*, *supra* note 16, at 1257.

Figure 5: Predicted Probability of Success for Establishment Clause Claims, Before and After *Arizona Christian School Tuition Organization v. Winn*[195]



In sum, the Supreme Court's change of doctrinal course in *Winn* appears likewise to have changed the outcome course of Establishment Clause decisions in the lower federal courts. No other factor that we have explored has produced such a marked change in predicted likelihood.[196] This single precedent may have been a game-changer for Establishment Clause decisions in the lower federal courts.

Readers might correctly characterize as one-sided the jurisprudential paradigm shifts in *Agostini* and *Winn* that we suggest have mitigated ideological influence on lower court judging in Establishment Clause cases. Both decisions may be described as advancing accommodation of religion in public life and thus circumscribing Establishment Clause claims.

Yet the Supreme Court presumably could have achieved a similar reduction in subjectivity and attendant abatement of ideological judging

195. Coefficients correspond to the meqrlogit regression results reported in Tbl.2, model 1, and are reported as marginal effects evaluated at the predicted sample mean. The whiskers demark the 95% confidence interval.

196. Although all other variables in our model were held constant, we cannot eliminate the possibility that a missing variable accounts for some or all of the dramatic variation post-*Winn*. That is, some other major change in the juridical environment that occurred at the same time as the *Winn* decision. Given that *Winn* appears at a pivotal point in the trajectory, and precedential change in the Supreme Court should impact lower court decisions, the attribution of the reduction in outcomes to *Winn* is a logical conclusion.

through landmark decisions moving in the opposite direction of stricter separation of church and state. Clearer rules of law and less ambiguous standards for less subjective application in the lower courts might be implemented without endorsing a particular normative approach to the fundamental Establishment Clause question. The persistent infection of ideology in federal court judging might have been treated by concerted movement in either direction. The prior failure to choose a direction, however, has been the cause of the "jurisprudential schizophrenia"[197] in Establishment Clause doctrine that has poisoned reasoned legal analysis.

3. Warnings About a Possible Resurgence of the Ideological Infection

Despite the potential good news in our 2006–2015 study that ideological influence may be waning, some scholars suggest that dark clouds of elevated political division in the federal courts are on the horizon and, indeed, may already be upon us.

Kenneth Manning, Robert Carp, and Lisa Holmes analyzed hundreds of federal district court decisions and concluded that judges appointed by President Trump are much more conservative in such areas as civil liberties and rights than judges appointed by any previous President, Republican or Democratic.[198] As discussed earlier,[199] the encouraging finding by Neal Devins and Allison Larsen that federal appellate judges do not frequently gather in partisan en banc cohorts was subject to the caveat that the Trump era had produced a "very striking" "uptick" in partisan splits and reversals in en banc rulings.[200]

Even more concerning, in a related field of law to our Establishment Clause study, Zalman Rothschild recently reported that a powerful partisan-split has emerged in the federal courts between 2016 and 2020 in Free Exercise cases.[201] Prior empirical studies, including ours, on Free Exercise cases have found no partisan-based influence in this category of religious

197. Thomas v. Anchorage Equal Rts. Comm'n, 165 F.3d 692, 717 (9th Cir. 1999).

198. Kenneth L. Manning, Robert A. Carp & Lisa M. Holmes, The Decision-Making Ideology of Federal Judges Appointed by President Trump 12 (Oct. 15, 2020) (unpublished working paper) (on file with University of Massachusetts Dartmouth)

199. *See supra* notes 88–92 and accompanying text.

200. Devins & Larsen, *supra* note 88, at 1380.

201. Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. (forthcoming 2022) (manuscript at 16–19) (on file with author).

liberty cases.[202] Our most recent comprehensive empirical study for 2006–2015 also has found no partisan influence in Free Exercise cases.[203] The Rothschild study focuses on that single five-year period and is one-dimensional in comparing outcomes in these cases between Republican- and Democratic-appointed judges.[204] Empirical study with a more-specified model and multivariate analysis remains to be conducted on this period. Nonetheless, the enormous size of the partisan disparity reported—with Democratic-appointed judges accepting Free Exercise accommodation claims at only a 7% rate, compared to a 56% rate for Republican-appointed judges[205]—certainly highlights the need for further exploration.

Perhaps parallel to these ongoing developments in the lower federal courts, Lee Epstein and Eric Posner have found pro-religion outcomes in the Supreme Court under Chief Justice Roberts to be rising substantially, breaking with the past in that a majority of this Court are ideologically conservative and religiously devout.[206]

In sum, it is premature to move past empirical studies of ideological influence in religious liberty decisions, whether under the Establishment or Free Exercise Clauses. More work remains to be done, both by empirical scholars in diagnosing the political infection and by judicial actors in seeking a mitigating treatment.

CONCLUSION: THE SEARCH FOR THE HOLY GRAIL OF IMPARTIAL JUDGING

The guardrails of the federal judiciary held in 2020. The rule of law turned back the concerted campaign of President Trump and his allies to overturn the results of a democratic election by baseless allegations of widespread fraud. But we must carefully document every collision against those guardrails, lest they be weakened over time or partisan influences on judicial outcomes be seen as anything other than deviations from the norm.

For these reasons, those of us who believe in impartial judging as a genuine aspiration should be sobered by the persistent partisan divide in the lower federal courts in deciding challenges to government action under the First Amendment prohibition against the establishment of religion. We should also decry meanderings in doctrine that depart from legal standards

202. Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1374 (2013); Shahshahani & Liu, *supra* note 46, at 734.

203. *See* Heise & Sisk, *supra* note 31.

204. Rothschild, *supra* note 201, at 15.

205. *Id.*

206. *See* Epstein & Posner, *supra* note 116, at 1, 7.

and appear to open the door widely to subjective evaluations by each individual judge.

As Jeffrey Rachlinski and Andrew Wistrich well explain, even though an "emphasis on deviations [in empirical studies] likely makes judges seem worse than they are," the scrutiny is important.[207] They continue:"[t]he circumstances under which judges deviate from the norm are nevertheless worth exploring, not to make judges look bad, but to identify potential ways they might improve."[208] For this reason, even as we see signs that the judicial ideological divide is narrowing, we continue to highlight the ambiguity of Establishment Clause doctrine as an attractive nuisance for political policy choices made by lawyers in robes.

As with the legendary search of the Knights of the Roundtable for the Holy Grail, the object of our present search—impartial and non-political judging—will remain elusive, sometimes tantalizingly within reach but always escaping our full grasp. We acknowledge that law is not perfectly determinate in every case. Judicial discretion is inevitable and even healthy in appropriate circumstances and when encircled by legal boundaries. And judges are human beings who bring their life experiences and general perspectives to the task. But the faithful seeker need not hold to the magical myth of the Holy Grail as thoroughly sanctifying the one who holds it and washing away all corruption. That human actors will always fall short in the aspiration for neutral and impartial judging is not an argument for abandoning the quest for that virtue.

As the legends of Percival and Sir Galahad teach us, what one learns on the journey toward the Holy Grail ultimately proves more valuable than seizing the chalice and taking full dominion over it. Charles Geyh reminds us that "there is an inescapable logic to the assumption that judges who embrace the rule of law as an article of faith are likely to take the rule of law more seriously than those who are agnostic."[209] For the real treasure of the Holy Grail lies, not in taking physical possession of an artifact, but in the growth in wisdom by those who are inspired to seek it. When a judge is drawn ever closer toward judicial impartiality and the rule of law, understood as distinct from politics and personal ideology, he or she should be shaped by the search.

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207. Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 205 (2017).

208. *Id.*

209. Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics*, 97 CORNELL L. REV. 191, 228 (2012).